In the High Court of Judicature at Madras

Dated : 1.10.2007

Coram :-

The Honourable Mr.Justice K.RAVIRAJA PANDIAN
and
The Honourable Mrs.Justice CHITRA VENKATARAMAN

Tax Case (Appeal) Nos.1259 to 1263 of 2007
M.P.Nos.1,1,1 and 1 of 2007

The Commissioner of Income Tax
Chennai . .. Appellant in all the Tax cases

Vs

Glamour Saree Musuem
Harbour Shop
Near Main Gate
Chennai 1. .. Respondent in all the tax cases

TAX CASE (APPEAL) under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 13.10.2006 made in I.T.A.Nos.47/Mds/2005,48/Mds/2005,49/Mds/2005 50/Mds/2005, 51/Mds/2005 for the assessment years 1989-90 , 1996-97, 1997-98, 1999-2000, 2000-01. (I.T.A.No.13/2002-03 dated 15.4.2003 and ITA.Nos.466, 465, 467 and 468/2004-2005 dated 23.8.2004 respectively on the file of the Commissioner of Income Tax (Appeals) IX Chennai 34 against

i. PAN/GIR No.G.I.33010-G dated 22.3.2002

ii. PAN/GIR No.PAN AAA FG3971A/33010-G dated 31.3.2004

iii. PAN/GIR No.PAN AAAFG3971A/33010-G dated 31.3.2004.

iv. PAN/GIR No.PAN AAA FG3971A/33010.G dated 31.3.2004 and

v. PAN/GIR No.PAN.AAAFG3971A/33010-G dated 31.3.2004 respectively on the file of the Income Tax Office, Business ward VIII (4) Chennai-6.

For Appellant : Mr.J.Narayanasamy
Standing Counsel (Income Tax)

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JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J)

The tax case appeals are filed by the revenue against the order of the Income Tax Appellate Tribunal Madras 'A' Bench confirming the order of the Commissioner of Income Tax Appeals granting the relief under Section 80 HHC. The assessee herein is a shop located inside Madras Harbour, Chennai. In respect of sales effected by the assessee, the assessee claimed deduction under Section 80 HHC. The assessing officer, however, rejected the plea of the assessee on the ground that the assessee had not exported the goods or merchandise and that as the assessee was trading the goods from his shop in India and held that the deduction under Section 80 HHC was not available. Aggrieved by the assessment orders, the assessee preferred appeals to the Commissioner of Income Tax (Appeals), who allowed the appeals and granted the relief. As against this order, the Revenue preferred appeals before the Tribunal, which confirmed the decision of the Commissioner of Income Tax (Appeals) by following the decisions of the Apex Court and other High Courts, wherein it was held that when the assessee had sold the goods in foreign exchange and the goods were taken outside India, the assessee was entitled for deduction under Section 80 HHC. Aggrieved by the said order, the Revenue has preferred the present tax case appeals by raising the following substantial questions of law:

> 1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessee is entitled for the deduction under Section 80HHC ?
>
> 2. Whether in the facts and circumstances of the case, the explanation (aa) to section 40 HHC(4C) which states that export outside India shall not include any transaction by way of sale or otherwise in a shop situated in India not involving clearance at any customs station is applicable to the assessee effecting sale through a shop in India ?

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2. Learned counsel appearing for the Revenue submitted that the assessee has not proved that the sale had involved clearance at any customs station as defined in Explanation (aa) to Section 80-HHC(4A) and hence, the assessee is not entitled to the relief of deduction under Section 80-HHC.

3. A perusal of the order of the assessing authority shows that the assessee had, in fact, produced before the assessing authority at the time of assessment, the orders of the Income Tax

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Appellate Tribunal relating to the sister concern made in ITA No.1618/Mds/93 dated 28.11.2000 and the copies of the agreement dated 14.2.1983 between the Trustees of Port Trust and the assessee; the copies of purchase and sales Invoices. In the course of the proceedings before the Commissioner of Income Tax (Appeals), the assessee produced copies of invoices and clearances that the customs authorities had to give and take the goods inside the customs notified area. The Commissioner of Income Tax Appeals wrote a letter to the Additional Commissioner of Income Tax (Appeals) to enquire into whether the shop is located in the customs notified area and the mode of sales and other relevant information for deciding the case. The Assistant Commissioner (Customs), vide his letter dated 20..5.2004, has made his clarification giving the following clarification. The same, extracted in the order of the Commissioner of Income Tax (Appeals), is as follows:

(i) M/s.Glamour Saree Museum is having shop inside the Chennai Harbour which is Custom's Station.

(ii) On verification of their cash bill books it is found that the goods are sold only on payment of foreign currency and the same are encashed through authorised dealers. However, in the absence of any previous records, the Department is unable to confirm as to whether they could sell only against foreign currency and whether sale against Indian currency will violate any conditions prescribed while issuing licence.

(iii) Customs clearance is not required at the time of sales, whereas the customs clearance is required when the goods are brought inside the harbour for sales.

(iv) The goods are being purchased from M/s.Glamour Saree Museum by tourite arriving by chartered ships and members of crew of various vessels touching Chennai Harbour. Since the goods are of Indian origin, the crew members who purchase the goods by paying foreign exchange can take it out at the time of signing off. No customs clearance is required as the goods are of Indian origin.

(v) With regard to "customs notified area" there is no 'Customs notified area' whereas as per Chapter 12(11) and (13) of the Customs Act, 1962 'Customs Area' means the area of Customs station and includes any area in which imported goods or export goods are ordinarily kept

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before clearance by Customs authorities: and 'Customs Station' means any Customs port, Customs airport or land customs station. "

4. Going by all these clarifications, the first appellate authority applied the decisions of the Supreme court reported in 259 ITR 684 (CIT VS. SILVER AND ARTS PALACE); 258 ITR 346 (ITO VS. VAIBHAV TEXTILES); 222 ITR 606 (RAM BABU & SONS VS. UNION OF INDIA) and held that the assessee had satisfied the two conditions (i) the goods were sold in foreign exchange and (ii) that the goods were exported out of India and found that the shop was also located in customs notified area and the same could not come back into India. Considering these aspects, the Commissioner of Income Tax (Appeals) rightly granted the relief under Section 80-HHC. On further appeal, before the Tribunal, it was pointed out that the conditions set forth in the decision of the Supreme Court were fully satisfied. Consequently, the Tribunal held that assessee was entitled to the relief under Section 80-HHC.

5. Learned counsel appearing for the Revenue submitted that the assessee had sold the goods from the shop situated near the Harbour and hence, the sale could not amount to an export to entitle to the deduction under Section 80-HHC. He further pointed out to the Explanation (aa) to Section 40-HHC(4C) that the sale would not fall under the category of 'export' to qualify for the deduction under Section 80-HHC. Learned counsel also referred to the decision of the Allahabad High Court reported in 222 ITR 606 (RAM BABU & SONS VS. UNION OF INDIA) as approved by the Apex Court in the decision reported in 259 ITR 684 (CIT VS. SILVER AND ARTS PALACE) when Explanation (aa) to Section 80HHC (4A) has been considered.

6. Section 80 HHC (4A) Explanation (aa) reads as follows:

" Section 80-HHC (4A) Explanation (aa):

"export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) "

7. As per the above explanation, a sale is not considered as an export sale (i) if it is a 'transaction by way of sale or otherwise in a shop, emporium or establishment in India and (ii) it does not include customs clearance.

8. Learned counsel appearing for the Revenue brought to our attention the decision of the Apex Court in reported in 259 ITR 684 (COMMISSIONER OF INCOME TAX Vs. SILVER AND ARTS PALACE),

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wherein, under similar circumstances, the Apex Court had considered the introduction of explanation (aa) to Section 80-HHC(4A). In the said judgment, the Apex Court affirmed the judgment of the Allahabad High Court in the decision reported in 222 ITR 606 (RAM BABU AND SONS VS. UNION OF INDIA), wherein it has been held that as per Explanation (aa) to Section 80-HHC (4A) of the Income Tax Act 1961, for the purpose of this Section, there will be no export out of India, if two conditions are cumulatively fulfilled, viz., (a) it is a transaction by way of sale or otherwise in a shop, emporium or establishment situated in India, and (b) that it does not involve clearance in any customs station as defined in the Customs Act. The Apex Court further held that there was no dispute between the parties; that the transactions of counter sales effected by the respondent involved customs clearance within the meaning of Explanation (aa) to Section 80 HHC (4A) of the Act and further that the sales were in convertible foreign exchange and in those circumstances, the Apex Court dismissed the appeal preferred by the Revenue.

9. Interpreting Explanation (aa) of Section 80-HHC(4A), the Apex Court referred to the decision of the Allahabad High Court reported in 222 ITR 606 (RAM BABU AND SONS Vs. UNION OF INDIA) and pointed out that the said decision has been consistently followed by several High Courts. The Apex Court also pointed out that the Special Leave Petition filed against the decision of the Allahabad High Court reported in 222 ITR 606 (RAM BABU AND SONS Vs. UNION OF INDIA) was dismissed summarily. Going by the meaning of Explanation (aa) to Section 80 HHC(4A) that the sales were in convertible foreign exchange, the Apex Court held that the assessee was entitled to the special deduction under Section 80-HHC in respect of the counter sales. A reading of the decision of the Allahabad High Court reported in 222 ITR 606 (RAM BABU AND SONS Vs. UNION OF INDIA) shows that even if either of the two conditions is not satisfied, it would be an export out of India. It held that Explanation (aa) has nothing to do with the seller or purchaser. It is the transaction which would involve clearance of customs if it is to be an export out of India within the meaning of Explanation (aa). The Allahabad High Court pointed out that the transaction would not be an export out of India, if two conditions are satisfied, namely, (i) it should be a transaction by way of sale in a shop, emporium or an establishment situate in India; (ii) it should not involve clearance in the customs as defined in the Customs Act.

10. In the background of the above-said exposition of law, a look at the facts in the case on hand would show that admittedly, the shop run by the assessee is situated in the customs notified area, as the assessee had also produced a copy the agreement dated 14.2.1983 between the Trustees of Port Trust and the assessee. It

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is not denied by the counsel for the Revenue that the goods were sold in foreign exchange and after the goods were sold, the same cannot come back to India. Hence, the conditions required for granting the relief under Section 80-HHC are fully satisfied.

11. Learned counsel for the Revenue submitted that the assessee had not produced any evidence as against its claim to have the benefit of deduction. However, going by the letter addressed by the Assistant Commissioner (Customs) dated 20.5.2004, which clearly shows that the assessee's shop is situated inside the Chennai Harbour which is Custom's station and the goods so purchased from there cannot come back into country for open market dealing, we are of the view there is no force in the contention of the counsel for the revenue. For the foregoing reasons, we are of the opinion that there is no question of law much less substantial question of law arises in these appeals so as to entertain the same. The tax case appeals are dismissed. Consequently, the connected M.Ps are closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

krr/ksv

To:

1. The Assistant Registrar,
Income-Tax Appellate Tribunal,
III Floor, Rajaji Bhavan,
Besant Nagar, Madras 90

2. The Commissioner of Income Tax, Chennai.

3. The Commissioner of Income Tax,
Appeals IX, Chennai 34.

4. The Income Tax Officer
Business Ward VIII (4), Chennai-6.

1 cc to Mrs. PushyaSitaraman, Sr. Standing Counsel for IR, Sr. 61178

Tax Case (Appeal) Nos.1259
to 1263 of 2007

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